85-1051

No. 85-

IN THE

Supreme Court of the United States

October Term, 1985

RICHARD ROE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the constitutional privilege against self-incrimination is available to an individual whose act of producing corporate records in response to grand jury subpoenas would be self-incriminatory.

2. Whether the constitutional protection may be avoided by a judicial direction that the subpoenaed corporations appoint a "new agent," who has no prior relation to the corporations, to produce corporate records if the identification and authentication of the documents can be accomplished only by the individual asserting the constitutional privilege.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a - 12a) is reported at 775 F.2d 43.. The oral findings of the district court granting the motion to quash the thirteen grand jury subpoenas (Pet App. B, pp. 13a - 15a) are not reported.

JURISDICTION

The opinion of the court of appeals was entered on October 15, 1985, and a timely petition for rehearing *en banc* was denied on November 18, 1985 (Pet. App. D, p. 17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (1976).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. . . .

STATEMENT

This case comes before this Court for review of a court of appeals' decision overturning a district court's decision to quash thirteen grand jury subpoenas *duces tecum* because Richard Roe's ("Roe")[1] production of documents in response to those subpoenas would likely incriminate him. We recount briefly the facts surrounding the subpoenas served on Roe, the district court's decision to quash those subpoenas, and the court of appeals' reversal of that decision.

1. Corporate subpoenas are served on Richard Roe.

On October 3, 1984, Roe was served, through counsel, with 13 subpoenas *duces tecum* issued by a grand jury in the Southern District of New York.[2] The subpoenas sought documents from 13 different corporate entities, designated in the district court as Corporations A

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1. Both parties have agreed to the use of pseudonyms in these proceedings in order to preserve grand jury secrecy and to protect the privacy rights of the parties.

2. In accepting service for Roe, his counsel expressly advised the federal agent that he was doing so as designee for Roe personally, and that he was not accepting service for, or acknowledging Roe's association with, any of the corporations to whom the subpoenas were addressed.

through *M*, at office addresses in New York City. Roe was not named in any of the subpoenas.

Each of the thirteen subpoenas recited that the grand jury was investigating alleged violations of 18 U.S.C. 371 (conspiracy) and 26 U.S.C. 7201 (tax evasion), and each had an "Attached Rider" enumerating the documents sought by the grand jury. Each rider requested the following ten categories of corporate documents for the years 1979-1983:

> 1. all sales invoices
> 2. all purchase orders
> 3. sales journal
> 4. accounts receivable ledger
> 5. general ledger/general journal
> 6. all corporate bank records to include bank statements, deposit slips, and cancelled checks
> 7. proof of delivery of merchandise sold, all shipping tickets and bills of lading
> 8. copies of income tax returns for the periods 1979 through 1983
> 9. list of all stockholders and/or corporate officers
> 10. name, address and telephone number for the corporate accounts for the above mentioned years.

2. Roe moves to quash the subpoenas.

Roe filed a timely motion to quash the thirteen corporate subpoenas served on him. In that motion, Roe argued that any act undertaken by him to produce records in response to these subpoenas might incriminate him since he was not a designated custodian of records of any of the corporations and a grand jury was conducting a criminal investigation involving the corporations. The prosecutor opposed the motion on the ground that the Fifth Amendment privilege does not apply to the produc-

tion of corporate documents. After hearing oral argument on the motion to quash on February 27, 1985, Judge Broderick determined that he would "have to have an evidentiary hearing" to resolve the matter (Tr. 2/27/85 at 39).

3. The district court conducts an evidentiary hearing.

The evidentiary hearing conducted by the district court lasted for two days.[3] At that hearing, the Government called seven witnesses to establish Roe's relationship to the thirteen corporations. The principal witness was a Special Agent of the Criminal Investigation Division of the Internal Revenue Service ("IRS") who testified that he was assigned to assist a grand jury investigation being conducted jointly by the IRS and other law enforcement agencies (Tr. 2-3). In examining the records of several large companies that were the subjects of that grand jury investigation, government agents came across "substantial amounts of invoices" that had been furnished by the 13 corporations to the subject companies (Tr. 3).[4] The agent also described various bank documents that he had procured relating to the 13 corporations named in the subpoenas (Tr. 4-12). These documents showed that the corporations had 23 different bank accounts and that Roe was an authorized signatory on all of these accounts (Tr. 12-13). The agent also testified that some documents relating to ten of the bank accounts (all at the same bank) listed Roe as an officer of the corporations, and that he was listed three times as president (Tr. 19-20).

On cross-examination, the agent acknowledged that the publicly filed official records of the corporations

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3. The hearing was held on March 4 and 5, 1985. "Tr." as used hereinafter refers to the transcript of the hearing held on those days.

4. The government obtained the copies of these invoices through subpoenas directed to the companies that were the subjects of the grand jury investigation and to the individual who owned those companies (Tr. 3-4).

did not list Roe's name (Tr. 24).[5] The individual named in the official corporate documents was John Doe,[6] who signed them in "the capacity of officer, director and stockholder" (Tr. 26). With respect to the bank documents that named Roe as an officer of some of the corporations, the agent testified that other bank documents relating to the same corporations named John Doe as holding the same corporate positions (Tr. 28-31). The agent also testified that various other individuals, besides Roe and Doe, were authorized signatories on all the bank accounts (Tr. 31).

The agent conceded that businesses frequently have one individual handling their banking and have other people handling other business activities (Tr. 35). The agent also admitted that nothing in the documents connected Roe with many of the categories of documents specified in the subpoenas, such as (1) sales invoices, orders or sales journals, (2) accounts receivables ledger, (3) general ledger and general journals, (4) proof of delivery of merchandise sold, shipping tickets and bills of lading, (5) income tax returns from 1979 through 1983, or (6) lists of all stockholders and/or corporate officers (Tr. 38). Finally, the agent admitted that he did not have any evidence that any of the above-described records even existed in the United States.

All but one of the remaining witnesses called by the Government were bank employees who generally testified that Roe, among others, conducted some banking business for some of the corporations at issue. (Tr. 40-42, 49, 57-58, 63-65, 82). The only other witness was a

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5. These officials corporate records, introduced into evidence as Roe Exhibits A-M, included the certificates of incorporation for all 13 of the corporations at issue and the subsequent certificates of dissolution for 12 of those corporations. The thirteenth corporation was also dissolved although the official file failed to contain the certificate of dissolution.

6. This is a pseudonym used to identify an individual who was the subject of other testimony.

managing agent of a New York office building which rented space to some of the corporations at issue. The managing agent testified that he had been told that Roe "was in charge" with respect to having the rent paid for this space (Tr. 80-81).

On the day following the evidentiary hearing, the district court heard renewed arguments from the parties on the motion to quash. During the argument, Judge Broderick vigorously questioned counsel for both parties, and thereafter announced that he found "this a rather difficult question and . . . want to give some more thought to " (Tr. 128).

4. The district court quashes the subpoenas.

On April 4, 1985, Judge Broderick orally announced his decision on the motion to quash (Pet. App. B, pp. 13a-15a). He first described his understanding of the state of the law:

> It is apparently established as the law, where the existence and the location of documents is a foregone conclusion, a party adds little in the way of testimonial supplement by conceding that he has those papers.
>
> It is, therefore, the law that the act of production doctrine, by the terms of which the very act of producing can be incriminatory, doesn't apply when a corporate representative is subpoenaed in his representative capacity and his possession of the records being subpoenaed is a foregone conclusion.

The judge then distinguished the facts of this case:

> That just isn't this case. The government can tell me very little or nothing with respect to whether these documents exist, where they are, what they are, and it is going to be neces-

> sary to elicit this information from Mr. Lewin's client.
>
> It is obvious Mr. Lewin's client can be personally incriminated by the answers he gives to testimony which is elicited from him, and the government has quite up front made it clear to me in the course of argument that it doesn't wish to immunize the defendant — I'm sorry, immunize Mr. Lewin's client, presumably because of this potential to elicit incriminating testimony.

Judge Broderick then concluded, on the basis of the facts presented to him, that production of the records by Roe would be self-incriminatory:

> As this matter has been presented to me, the production of the records by Mr. Lewin's client may be incriminating, if in fact there are such records, and disclosure of the fact that there are no records may be incriminating if there are none, if there are no such records.
>
> It may be incriminating if Mr. Lewin's client either admits possession and existence of these documents or authenticates the documents.

On these grounds, the judge entered an order quashing the subpoenas (Pet. App. C, p. 16a).

5. The Government appeals, and the court of appeals reverses.

In quashing the thirteen subpoenas, Judge Broderick expressly noted that the Government could "avoid the entire problem by agreeing to endow with a limited immunity" (Pet. App. B, p. 15a). The Government decided, instead, to appeal Judge Broderick's decision to the United States Court of Appeals for the Second Circuit. On appeal, the Government repeated its argu-

ment that, as a matter of law, the subpoenas should not have been quashed because the Fifth Amendment privilege was entirely inapplicable to the production of corporate records. In support of the district court's decision, Roe argued that this Court, in *United States v. Doe*, 465 U.S. 605 (1984), had expressly recognized the possibilities of self-incrimination inherent in the production of documents, and had reaffirmed an individual's right to claim the constitutional privilege when one of those possibilities became manifest. The question, Roe argued, turned on the factual likelihood of an individual's incrimination, not on the status of the documents to be produced.

The court of appeals reversed Judge Broderick's order quashing the subpoenas. The court held that (Pet. App. A, p. 9a):

> The act-of-production privilege sustained in *Doe* with respect to the records of a sole proprietorship simply cannot be extended to encompass the production of corporate records. *Doe* does not modify or overrule prior law creating a distinction for fifth amendment purposes between entities that have 'a recognizable, juridical existence' separate from their members and those that do not.

The court then said that the corporation could eliminate the possibility of incrimination by simply appointing a "new agent" to produce the documents to the grand jury.

REASONS FOR GRANTING THE WRIT

1. The unreasonably narrow view of act-of-production incrimination.

This Court held in *United States v. Doe*, 465 U.S. at 612, that "[a]lthough the contents of a document may not be privileged, the act of producing the document may be." The Court's *Doe* decision applied the constitutional privilege to the act of producing documents where "the holder of the documents" is forced by the subpoena "to perform an act that may have testimonial aspects and an incriminating effect." *Id.*

The various courts of appeals have split over the application of the *Doe* ruling to the production of corporate records. Panels of two Circuits — the Third and the Sixth — initially interpreted *Doe* to allow an individual who would be personally incriminated by the act of producing corporate documents to claim the Fifth Amendment privilege in response to a grand jury subpoena. *See In re Grand Jury Matter (Brown)*, 744 F.2d 338 (3rd Cir. 1984); *In re Grand Jury Proceedings (Morganstern)*, 747 F.2d 1098 (6th Cir. 1984). On rehearing *en banc*, the Third and the Sixth Circuits disagreed. The Third Circuit ruled that an individual's authentication of corporate records is subject to the Fifth Amendment privilege, (*In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3rd Cir. 1985)), whereas the Sixth Circuit has now rejected the same claim. (*In re Grand Jury Proceedings (Morganstern)*, No. 84-5235 (6th Cir. August 23, 1985)). The Solicitor General did not seek *certiorari* from the Third Circuit's decision, and he has acknowledged in responding to the petition for *certiorari* to review the Sixth Circuit's ruling that "the Circuits have rendered inconsistent opinions regarding the question" and that the decisions of the courts of appeals "exhibit considerable disagreement regarding the governing legal rules in this area." *See Morganstern v.*

United States, No. 85-658 Memorandum for the United States in Opposition at 2-3 ("Memorandum in Opposition").[7]

This case presents the appropriate factual record for resolution of this debated issue. It is plain that if Roe is compelled to comply with this subpoena, he will be incriminating himself. As Judge Broderick observed, Roe has a Hobson's choice — "production of the records . . . may be incriminating, if in fact there are such records, and disclosure of the fact that there are no records may be incriminating if there are none" (Pet. App. B, p. 14a). On its facts, this case parallels the *Doe* decision, where this Court approvingly quoted the court of appeals' observation (465 U.S. at 613-614 n.12):

> The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist — or that the appellee even is somehow connected to the business entities under investigation — is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself.

2. The unworkable solution.

The court below sought to avoid the constitutional dilemma by suggesting that the corporations appoint a "new agent" to produce the requested documents to the grand jury. The court applied this "solution" despite proof that the corporations had been lawfully dissolved long ago. In this setting, the judicial "solution" devised by the court below is wholly unworkable.

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7. The Solicitor General opposed the granting of the petition, however, on the ground that the ruling was moot because the documents at issue had already been produced to the grand jury. Memorandum in Opposition at 4; *compare* Pet. App. E, p. 18a (staying production of documents pending filing of this petition). On December 13, 1985, this Court denied the petition.

If a corporation possesses documents that are incriminatory, and if the identification and authentication of them to a grand jury would incriminate the individual who produces them, the risk of incrimination cannot be avoided by telling the corporation to assign an errand-boy to deliver the requested records. Production of documents before a grand jury requires more than the mere delivery of papers by messenger. The producing witness is required to identify the records as the complete body of documents that the corporation possesses in response to the subpoena. He must also attest to the fact that the records are the authentic records of the corporation, so that they may subsequently be admitted into evidence.

The decision below ignores these realities of document production. If a corporation has no "knowledgeable employee" who can produce the requested documents without fear of incrimination, how is a "new agent" to know whether the documents he delivers are responsive to the subpoena and are authentic? He can only know if he is told by an individual whose testimony, if given directly, would be self-incriminatory. Compelling such an individual to communicate this self-incriminatory information to this "new agent," who will then testify before the grand jury, is patently compelled self-incrimination.

The "solution" devised by the court below is remote from the realities of corporate operation, particularly as applied to small, family-owned corporations. Moreover, the very same "solution," if constitutionally permissible, could apply equally to individuals. An individual who has sole-proprietorship records could be served with a subpoena and told to appoint a "new agent" to deliver the records to the grand jury. This rationale would enable the prosecutor *in all cases* to avoid entirely this Court's act-of-production holding in *Doe*. The validity of such a judicial "solution" should plainly be reviewed by this Court.

CONCLUSION

This case presents important issues relating to the constitutional right to be free from compelled self-incrimination when the acts of production and authentication of records present real dangers to that constitutional right. The courts of appeals disagree on the question whether this Court's *Doe* ruling applies to corporate records, and the issue can be resolved squarely in this case. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 18, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 100—August Term 1985

Argued: August 28, 1985 Decided: October 15, 1985

Docket No. 85-1154

In re: GRAND JURY SUBPOENAS ISSUED TO THIRTEEN CORPORATIONS

UNITED STATES OF AMERICA,

Appellant,

—against—

RICHARD ROE,

Appellee.

Before:

FEINBERG, *Chief Judge*,
KEARSE and CARDAMONE, *Circuit Judges*.

Appeal f[illegible]der quashing grand jury subpoenas duces tecum [illegible] to thirteen corporations.

Reversed.

NATHAN LEWIN, Washington, DC (Miller Cassidy, Larroca & Lewin, Stephen L. Braga, of Counsel), *for Appellee*.

STUART E. ABRAMS, New York, NY, Assistant United States Attorney for the Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Paul E. Summit, of Counsel), *for Appellant*.

FEINBERG, *Chief Judge*:

The government appeals from an order of the United States District Court for the Southern District of New York, Vincent L. Broderick, J., granting a motion to quash grand jury subpoenas duces tecum issued to thirteen corporations. The subpoenas called for the production of corporate records. Richard Roe[1] moved to quash on fifth amendment grounds. For the reasons stated below, the district court's order must be reversed.

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1 The parties have agreed to proceed under pseudonyms. Appellee will be referred to as Richard Roe and the other individuals and corporations will also be identified by pseudonyms.

I.

Pursuant to its investigation of possible tax evasion and other offenses, a grand jury in the Southern District issued subpoenas duces tecum to thirteen New York corporations calling for the production of enumerated corporate records.[2] These corporations, referred to as the "Z Companies," were suspected of issuing fraudulent invoices for large amounts to the target of the grand jury investigation. Roe was connected to the corporations through bank records.

Counsel for Roe accepted service of the subpoenas on Roe's behalf;[3] thereafter, Roe moved to quash them. In March 1985, Judge Broderick held an evidentiary hearing on the motion to quash. An IRS agent testified as to the scope of the grand jury's investigation and the manner in

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2 The subpoenas called for the production of the following records, for the period 1979-1983:

1. all sales invoices
2. all purchase orders
3. sales journals
4. accounts receivable ledger
5. general ledger/general journal
6. all corporate bank records to include bank statements, deposit slips, and cancelled checks
7. proof of delivery of merchandise sold, all shipping tickets and bills of lading
8. copies of income tax returns for the periods 1979 through 1983
9. list of all stockholders and/or corporate officers
10. name, address and telephone number for the corporate accounts for the above mentioned years.

3 There is apparently some disagreement as to the capacity in which counsel for Richard Roe accepted the subpoenas. Although he maintains that the subpoenas were accepted only on behalf of Roe as an individual, counsel for Roe admitted that service was accepted "for whatever it was." Because we find that the corporation could effectively be served through service on Roe, we do not need to resolve this dispute.

which Roe and the Z Companies were connected to that investigation. The government then introduced bank records listing Roe as an authorized signatory on 23 corporate accounts and, in some cases, describing him as an officer. Officials from three banks testified concerning Roe's extensive involvement with the banking affairs of the corporations, although none had specific evidence of Roe's status as an officer, director or shareholder of any of the Z Companies. A rental agent also testified that he had dealt with Roe in securing rental payments and considered him to be the "principal" of several of the corporations.

Roe did not testify or call witnesses on his behalf, although he later introduced certificates of dissolution for twelve of the corporations. These documents identified an individual other than Roe—referred to as John Doe—as president, director and shareholder. We are told that Doe is a Swiss citizen who does not reside in the United States. The bank officials testified that Doe's name appeared as an authorized signatory on a number of the corporate accounts; one official recalled seeing Doe in the bank on a few occasions. Roe's son-in-law, daughter and two individuals, other than Doe, were also mentioned as transacting business on behalf of the corporations.

In the district court, Roe argued that the government's evidence established only his connection with the banking affairs of the corporations and that the records subpoenaed went well beyond banking records. He also argued that because of the government's lack of knowledge about the records of the Z Companies, his production and authentication of the documents would be testimonial in nature, that these acts could incriminate him and that he was entitled to claim his fifth amendment

privilege. The government maintained that the corporations had been properly served through service of the subpoenas on Roe. This being the case, the government insisted that it was entitled to have someone produce the records on the corporation's behalf or testify that such records did not exist.

In April, Judge Broderick announced his decision to quash the subpoenas. The apparent basis for his ruling was that production by Roe, under circumstances where the existence and authenticity of the documents were not foregone conclusions, would be self-incriminatory. He cited the government's lack of information about the documents sought and its unwillingness to immunize Roe in order to obtain the documents. This appeal followed. The order quashing the subpoenas has been stayed pending appeal; Judge Broderick also ordered that the documents subpoenaed were not to be moved, transferred or destroyed.

II.

After the briefs in this appeal were filed, a panel of this court decided In re Two Grand Jury Subpoenae Duces Tecum, One Dated January 28, 1985, The Other Undated, No. 85-6067, slip op. 5255 (2d Cir. July 25, 1985) (In re Two Grand Jury Subpoenae), which is dispositive of many of the issues presented here. In that case, this court affirmed a district court's order denying a motion to quash two grand jury subpoenas duces tecum directed to a corporation.[4] The court relied on the well-established

[4] One subpoena was addressed to the corporation and the other to the custodian of corporate records. The district court limited the subpoenas, however, which "had the effect of directing them solely to the corporation." In re Two Grand Jury Subpoenae, supra, slip op. at 5259.

rule that a corporate representative, acting in his or her representative capacity, cannot claim a fifth amendment privilege against the production of corporate documents. Id. at 5262, citing Bellis v. United States, 417 U.S. 85, 88-89, 100 (1974); In re Grand Jury Subpoenas Duces Tecum (Saxon Industries), 722 F.2d 981, 986 (2d Cir. 1983). The only exception to this rule may occur when an individual is *personally* compelled to produce and authenticate corporate records and those acts are self-incriminatory. In re Two Grand Jury Subpoenae, supra, slip op. at 5263. The court emphasized, however, that "[t]here simply is no situation in which the fifth amendment would prevent a *corporation* from producing corporate records, for the corporation itself has no fifth amendment privilege." Id. at 5264 (emphasis supplied), citing United States v. Barth, 745 F.2d 184, 189 (2d Cir. 1984), cert. denied, 105 S. Ct. 1356 (1985).

We conclude that *In re Two Grand Jury Subpoenae* requires reversal of the district court's order. The principals involved in these corporations have received the benefits of the corporate form and they must also accept its obligations, which include the unavailability for the corporations of a fifth amendment privilege against self-incrimination. A contrary holding would allow a corporation, whose controlling figures had involved it in criminal activity, to avoid production of corporate documents by virtue of that criminality, while all other corporations would have no such option. Since corporations have no fifth amendment privilege, this simply does not make sense.

As a preliminary matter, we find that the corporations were effectively served by service on Roe through his attorney. The district court did not make a specific deter-

mination on the issue of service, apparently because the judge quashed the subpoenas on other grounds. However, at oral argument, the judge did characterize Roe as "the major guru" of the corporations, and noted that "he is a perfectly appropriate person to serve with a subpoena." In any event, we have reviewed the evidence presented and find that it establishes that the corporations were properly served. A corporation may be served through an officer or agent explicitly or implicitly authorized to accept service of process. See Fed.R.Civ.P. 4(d)(3); In re Electric & Musical Industries, Ltd., Middlesex, England, 155 F. Supp. 892, 893 (S.D.N.Y.), appeal dismissed, 249 F.2d 308 (2d Cir. 1957). Roe's involvement in the financial affairs of the corporations was sufficient to make him an agent on whom subpoenas could be served. Koupetoris v. Konkar Intrepid Corp., 535 F.2d 1392, 1395-96 (2d Cir. 1976) (service on owner's managing agent adequate service); Boryk v. deHavilland Aircraft Co., 341 F.2d 666, 668-69 (2d Cir. 1965) (service on the president of subsidiary adequate; label attached to the agent and lack of explicit authority to accept service not determinative).

The subpoenas were issued to the corporation, not to Roe. They do not mention him. Indeed, the government first attempted to serve John Doe, who is listed on some documents as an officer, but was unable to do so. Service was then made on Roe, as the other person known to be connected with the corporations. The records are the kind that corporations ordinarily maintain, and the subpoenas do not demand that Roe himself produce them. By directing the subpoenas to the corporations, the government must be satisfied with production by any representative of the corporations; strictly speaking, the proceedings are between the government and the corporations. Roe

relies on two recent decisions of this court, but both are distinguishable. In *Saxon Industries*, supra, the subpoena was directed to an individual no longer connected with the corporation whose records were being sought, and in In re Katz, 623 F.2d 122 (2d Cir. 1980), the subpoena was directed to an attorney. See In re Two Grand Jury Subpoenae, supra, slip op. at 5268-69 (discussing cited cases). Roe also relies on the recent in banc decision of the Third Circuit, In re Grand Jury Matter (Brown), No. 84-1475, slip op. at 3 (3d Cir. July 23, 1985) (in banc), but in that case the subpoena was addressed to a named custodian. Indeed, the Third Circuit noted that "[r]ecords of collective entities still must be maintained, and their production can be compelled by a subpoena *duces tecum* addressed to the entity." Id. at 9.

In re Two Grand Jury Subpoenae also disposes of Roe's principal argument in support of the decision below. Roe urges a distinction between cases where the act of production adds little or nothing to the government's case, because the existence and authenticity of the corporate documents produced are "a foregone conclusion," and those where the act of production adds significantly to the sum total of the government's information, Fisher v. United States, 425 U.S. 391, 411 (1976). While recognizing that a fifth amendment privilege is unavailable in the former situation, Roe argues that it can be asserted in the latter "unusual" case, because the act of production possesses significant testimonial aspects. In support of this distinction, Roe primarily relies on United States v. Doe, 104 S.Ct. 1237, 1243 & nn.11-13 (1984), and decisions in this circuit. See, e.g., In re Katz, supra, Saxon Industries, supra. *In re Two Grand Jury Subpoenae* held that even the latter situation "does not relieve

the corporation of its continuing obligation to produce the subpoenaed documents." Slip op. at 5264 (citation omitted). In such cases, "the corporation must appoint some other employee to produce the records," or, if no employee could do so without incriminating himself or herself, "the corporation may be required to produce the records by supplying an entirely new agent who has no previous connection with the corporation. . . ." Id.

In *In re Two Grand Jury Subpoenae* the court also rejected an expansive reading of *Doe*. The act-of-production privilege sustained in *Doe* with respect to the records of a sole proprietorship simply cannot be extended to encompass the production of corporate records. Slip op. at 5265-67. *Doe* does not modify or overrule prior law creating a distinction for fifth amendment purposes between entities that have "a recognizable, juridical existence" separate from their members and those that do not. Id. at 5267-69.

III.

This case presents one issue not resolved by *In re Two Grand Jury Subpoenae*: whether a different rule should obtain where the corporations were dissolved prior to the issuance of the subpoenas.[5] Although the district court did not rely on the fact of dissolution in reaching its decision to quash the subpoenas, Roe maintains that dissolution is relevant because it means that the corporations no longer exist, which in turn means that any obligation to produce corporate documents falls upon

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5 Certificates of dissolution were introduced with respect to twelve of the thirteen corporations; counsel for both parties indicated their belief that the thirteenth was also dissolved. There is no indication that dissolution was in any way connected to the grand jury investigation.

him individually. Roe also argues that dissolution eliminates the option of having the corporations appoint someone for the purpose of producing the subpoenaed records, for whom the act of production would not be self-incriminating. See In re Two Grand Jury Subpoenae, supra, slip op. at 5264, citing United States v. Barth, supra, 745 F.2d at 189.

We do not agree with Roe's analysis of the consequences of dissolution. Dissolution does not furnish a corporate representative any greater claim to a fifth amendment privilege. See Bellis v. United States, supra, 417 U.S. at 88-89, 97 n.3, citing Wheeler v. United States, 226 U.S. 478, 489-90 (1913), and Grant v. United States, 227 U.S. 74, 80 (1913). Furthermore, under New York corporation law, a dissolved corporation does not cease to exist for all purposes. N.Y. Bus. Corp. Law § 1006(a) (McKinney 1963) (continuation for the purpose of winding up its affairs); Independent Investor Protective League v. Time, Inc., 50 N.Y.2d 259 (1980). On the contrary, a dissolved corporation "may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it." N.Y. Bus. Corp. Law § 1006(a)(4). Dissolution does not "affect any remedy available to or against such corporation . . . for any right or claim existing or any liability incurred before such dissolution." Id. § 1006(b). Thus, applicable state law establishes a corporation's continuing obligation to respond to subpoenas relating to pre-dissolution conduct as well as its amenability to sanctions should it fail to do so.

If, in order to respond to the subpoenas, it becomes necessary for the corporations to appoint an agent to

produce and authenticate the records subpoenaed, we believe that § 1006 would empower the corporations to make the appointment. Should the corporations prove unable or unwilling to take this action, the district court could order them to do so. See United States v. Barth, supra, 745 F.2d at 189. Moreover, another section of the corporation law suggests an alternative means of securing the records. Section 1008(a)(7) provides for special proceedings before the state supreme court and specifically allows the court to make appropriate orders relative to "[t]he disposition . . . of records, documents and papers of the corporation." It may also be that under state or federal law there are other sound bases for dealing with the situation here by appointment of an agent to produce corporate records. We leave such questions for exploration, if necessary, by the district court on remand.

We recognize that dissolution adds to the difficulties inherent in the appointment process in closed corporations. Roe has indicated that the persons connected with the corporations, other than Doe, are relatives and that their act of production poses the same danger of incrimination. Even if the corporation were able to appoint some third party to produce and authenticate these records, he claims that he would have to inform the agent that these were the records sought and that they were authentic, which could then be used against him.

However, the essence of *Fisher* and *Doe* is protection against "compelled testimonial self-incrimination," 425 U.S. at 399, by the person claiming the privilege. If one of Roe's relatives or associates complies with the subpoena, any information obtained from Roe would not have been extracted under an order requiring him to testify. Moreover, at least one person other than Doe and

apparently unrelated to Roe has been associated with the corporations; he is referred to as the secretary of the corporations on some documents. This person might be able to respond to the subpoenas on the corporation's behalf, without incriminating himself. Thus, we do not share Roe's view that appointment of an outsider would necessarily involve Roe in self-incrimination. As we said in In re Two Grand Jury Subpoenae, supra, slip op. at 5265 "[Roe] himself is not being required to testify through any personal act of production." In any event, dissolution does not alter the fact that the government is entitled to compliance with the subpoenas issued to the corporations. Someone representing the corporations or an outside agent appointed for this purpose must produce the existing records subpoenaed.

The government insists that, if the subpoenaed records do not exist, Roe or some other corporate representative can be required to testify to that fact and cites United States v. O'Henry's Film Works, Inc., 598 F.2d 313, 316-18 (2d Cir. 1979) in support of this contention. We are unsure of the status of this case after *Doe*, but under the reasoning of *In re Two Grand Jury Subpoenae*, we do not need to reach this issue at this time.

We reverse the order quashing the subpoenas and direct the district court to enforce the subpoenas.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

GRAND JURY SUBPOENA of 13 CORPORATIONS — M 11-188

New York, New York
April 4, 1985—5:00 p.m.

BEFORE:

HON. VINCENT L. BRODERICK,
U.S. District Judge

APPEARANCES:

RUDOLPH W. GIULIANI,
United States Attorney
for the Southern District of New York
BY: STUART ABRAMS,
Assistant United States Attorney

NATHAN LEWIN,
Attorney for Corporations

* * * * *

(In the robing room)

THE COURT: We are dealing here with subpoenas which are directed to thirteen corporations: Service of this subpoena was made upon Mr. Lewin, and the understanding was that that was service as if, just as if that service had been made on Mr. Lewin's client, but it was made clear, as I understand it, in accepting service, that Mr. Lewin didn't acknowledge, on behalf of his client, that his client had any association with the thirteen corporations, and Mr. Lewin was not accepting service on behalf of the corporations, he was taking the legal posi-

tion, in fact, that service on his client was not service on the corporations.

I have considered very carefully the government's argument that it should be permitted to enforce these subpoenas against the corporations, as against Mr. Lewin's client, but I do not see how the production of documents with respect to any one of these corporations by Mr. Lewin's client would be otherwise than the incriminating act which Mr. Lewin has argued it would be.

It is apparently established as the law, where the existence and the location of documents is a foregone conclusion, a party adds little in the way of testimonial supplement by conceding that he has those papers.

It is, therefore, the law that the act of production doctrine, by the terms of which the very act of producing can be incriminatory, doesn't apply when a corporate representative is subpoenaed in his representative capacity and his possession of the records being subpoenaed is a foregone conclusion.

That just isn't this case. The government can tell me very little or nothing with respect to whether these documents exist, where they are, what they are, and it is going to be necessary to elicit this information from Mr. Lewin's client.

It is obvious that Mr. Lewin's client can be personally incriminated by the answers he gives to testimony which is elicited from him, and the government has quite up front made it clear to me in the course of argument that it doesn't wish to immunize the defendant — I'm sorry, immunize Mr. Lewin's client, presumably because of this potential to elicit incriminating testimony.

As this matter has been presented to me, the production of the records by Mr. Lewin's client may be incriminating, if in fact there are such records, and disclosure of the fact that there are no records may be incriminating if there are none, if there are no such records.

It may be incriminating if Mr. Lewin's client either admits possession and existence of these documents or authenticates the documents.

The government can avoid the entire problem by agreeing to endow Mr. Lewin's client with a limited immunity, and since it has indicated that it is not willing to do that, I grant the application to quash the subpoena.

MR. ABRAMS.: Your Honor, may I ask two brief questions?

First, will the Court be issuing any opinion in this matter other than what has been stated today?

THE COURT: No.

MR. ABRAMS: Secondly, I would like to consider whether or not the government will be pursuing an appeal in this matter. I don't know whether it will be necessary to ask for a stay, but I would at least like to have it understood that during the pendency of any appeal in this matter the subpoena will be treated as though it were in effect so that the records would not be destroyed or transferred, if in fact any records do exist.

THE COURT: I think that's fair, and I think Mr. Lewin agrees to that.

MR. LEWIN: Yes, your Honor.

THE COURT: Why don't you gentlemen agree on an order which you will submit to me. It will say in substance that in accordance with the statements made on the record on April 4, the application to quash the subpoena is granted. This order is stayed pending appeal and the petitioner, or the movant, has agreed, and it is ordered that pending appeal, if there is an appeal, or until such time as the time to appeal expires, the petitioner will keep the documents, if there are such documents, in their pristine state.

MR. LEWIN: We accept that. We have indicated to Mr. Abrams originally, from the time the subpoena was served, that all that period of time we would consider the subpoena in effect from the time I received it, so there is no problem in that regard.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GRAND JURY SUBPOENAS FOR RECORDS OF THIRTEEN CORPORATIONS	**ORDER** M 11-188 (VLB)

It is hereby

ORDERED that the motion to quash the Grand Jury Subpoenas duces tecum in the above-referenced matter is granted; and it is further,

ORDERED that this Order is stayed pending the disposition of any appeal in this matter and no records called for by any subpoenas in this case shall be moved, transferred, or destroyed during the pendency of any such appeal.

Dated: New York, New York
April 8, 1985

/s/ VINCENT L. BRODERICK

HON. VINCENT L. BRODERICK,
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed November 18, 1985.

In re: GRAND JURY SUBPOENAS ISSUED TO THIRTEEN CORPORATIONS

UNITED STATES OF AMERICA,
Appellant,
-against-
RICHARD ROE,
Appellee.

Docket No. 85-1154

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee, Richard Roe

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States	:	85-1154
	:	Notice of Motion
v.	:	for Stay of
Richard Roe	:	Mandate

ORDER

Before: Hon. Wilfred Feinberg, Chief Judge
Hon. Amalya L. Kearse, Hon. Richard J. Cardamone,
Circuit Judges

IT IS HEREBY ORDERED that the motion be and it hereby is granted for 30 days pending the filing of a petition with the Supreme Court for a Writ of Certiorari pursuant to rule 41(b) of FRAP.

ELAINE B. GOLDSMITH,
Clerk

Date: November 18, 1985.